

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-7008

To be argued by
MILTON I. ROTHMAN

In The

United States Court of Appeals

For The Second Circuit

ANASTASIA KANDELL,

Plaintiff-Appellant,

against

RAYDELL PUBLISHING AND DISTRIBUTING
CORPORATION EMPLOYEES PENSION PLAN,

Defendant-Appellee.

On Appeal from a Judgment of the United States District Court
for the Southern District of New York.

BRIEF FOR DEFENDANT-APPELLEE

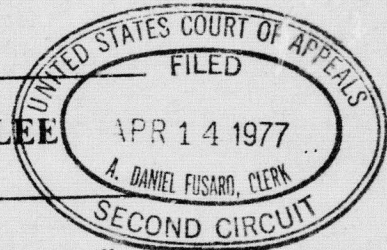
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UNITED STATES COURT OF APPEALS
For The Second Circuit
No. 77 - 7008

ANASTASIA KANDELL,

Plaintiff-Appellant,

- against -

RAYDELL PUBLISHING AND DISTRIBUTING
CORPORATION EMPLOYEES PENSION PLAN,

Defendant-Appellee.

APPELLEE'S BRIEF

Defendant-appellee, Raydell Publishing And Distributing Corporation Employees Pension Plan, resists this appeal from a judgment entered on December 20, 1976, by the United States District Court for the Southern District of New York (Whitman Knapp, U.S.D.J.), dismissing plaintiff's action on the merits on tender of payment of \$8,700.00 from defendant to plaintiff (84a) and endorses the same as well as the opinion of Judge Knapp (79a).

Statement of the Issue Presented for Review

The parties agree that the singular issue presented to the District Judge for determination, and to this Court for review, is the proper base to be utilized in computing the monies due to the estate of the deceased participant. Should the amount of the death benefit be based upon the earnings in 1974 only (appellant's contention) or upon the deceased highest five (5) consecutive years of earnings (appellee's contention).

Statement of the Case

Appellee agrees that appellant's Statement of the Case, in all but the last paragraph thereof, is accurate and reproduces the same hereinafter solely for continuity. Only the last paragraph differs.

Nature of Case and Proceedings Below

Plaintiff brought this action under the Employee Retirement Income Security Act of 1974, 88 Stat. 891; U.S.C., Title 29, Sect. 1132. She claims that there is due her, as the widow and named beneficiary of Irving Kandell, a participant of a qualified pension plan, the sum of \$17,562.00, representing his actuarially adjusted portion of the Auxiliary Investment Fund (Complaint, 3a-5a). In its answer (6a) defendant denies solely that there is due plaintiff the amount claimed by her. It is defendant's contention that there is only due her the sum of \$8,700.00 (8a), based upon the decedent's five highest consecutive years of earnings, and that amount defendant has tendered (79a-80a).

After a brief trial, the District Judge agreed with defendant's interpretation of the pension plan (81a) and rendered judgment (84a-85a) dismissing the action on the merits on defendant's tender of payment of \$8,700.00.

The Facts

Irving Kandell and Raymond Lussa were the two sole officers and directors of the Raydell Publishing and Distributing Corporation and the sole two participants in its pension plan (79a). Kandell died on December 9, 1974, leaving plaintiff as his designated beneficiary (79a).

The pension plan, with the amendments (plaintiff's Exhibit 1, 51a-74a), was adopted on November 15, 1971 (36a), and took effect on that day (55a). November 15 of each year is the anniversary date of the plan (39a).

Upon the death of her husband, plaintiff was paid the proceeds of his life insurance policy (5a) and was tendered by the Trustee of the pension plan the sum of \$8,700.00, based upon the decedent's five highest consecutive years of earnings (79a-80a). Plaintiff declined the tender claiming that she was entitled to \$17,562.00, based upon the decedent's last full year of earnings (79a-80a).

No letter of P.F.R. Planning, Inc. was introduced into evidence. There is a reference to such a letter in the post-trial dated letter of appellant's witness, which letter was appended to Plaintiff's Post Hearing Memorandum. Additionally, there has been no testimony that "the reduction of benefits in Mr. Kandell's death created a large surplus in the separate investment fund."

POINT I

THE AMOUNT OF THE DEATH BENEFIT
SHOULD BE BASED UPON THE HIGHEST
FIVE CONSECUTIVE YEARS OF EARNINGS

Article IV (65a) of "THE GUARDIAN LIFE VARIABLE FORM PROTOTYPE PENSION PLAN & TRUST AGREEMENT" (hereinafter the "Plan") is entitled "RETIREMENT and DEATH BENEFITS" and states:

4.04 "The Participant's benefit at his Normal Retirement Date shall be based on the average of his compensation for the highest five (5) years within a period of ten years preceding the fifth anniversary prior to his Normal Retirement Date."

Sections 4.01, 4.02 and 4.03 immediately preceding the above quoted Section 4.04 all refer to monthly retirement benefits. I do not believe there is any argument but that the words "The Participant's benefit" refer to the monthly benefit. Article IV, Section 4.04 is the only section of the Plan which provides the base for establishing the monthly benefit.

Page 4, Section 10 of the ADOPTION AGREEMENT (omitted from Appellee's copy of the Appendix) is titled "Pre Retirement Death Benefit Combination Plan" and states:

"Defined Benefit Plan: The death benefit under a Policy shall be 100 times the anticipated monthly Retirement Benefit under the Plan."

Based upon the above two quotations, the actuary who administers the plan (Mr. Steven Fishman, defendant's sole witness) calculated the pension benefit for the deceased as of November 15, 1974, based upon his five highest consecutive years of earnings. Averaging income during such highest five year period resulted in an average monthly computation of \$4,391.00. Using the formula provided (24.75% of the average monthly computation, equalling \$1,087.00 and multiplying same 100 times) he arrived at a death benefit figure of \$108,700.00 of which \$100,000.00 has been paid pursuant to the life insurance policy. There is no argument as to the mathematics, only as to the base.

POINT II

THE TENDERED \$8,700.00 REPRESENTS
THE ACTUARIALLY ADJUSTED PORTION
OF THE AUXILIARY INVESTMENT FUND

The Amendments to the Plan amends Section 10 of the Adoption Agreement as follows:

"The death benefit under this Plan shall be the full amount of any death benefit payable under a Policy plus the deceased Participant's actuarilly adjusted portion of the Auxiliary Investment Fund. In no event shall the death benefit be greater than would be provided if this was a Fully Insured Plan." (emphasis added)

Mr. Steven Fishman, defendant's sole witness is associated with P.F.R. Planning, Inc., Actuaries & Administrators. He is an adjunct assistant professor at the College of Insurance for the last nine years and an enrolled actuary with the Federal Government (32a). P.F.R. Planning, Inc. assisted in the design and installation of the Raydell Publishing & Distributing Corp. Employees Pension Plan, and have, since the inception of the plan, acted as administrative pension consultants to the trustees of this plan. Mr. Fishman testified (34a):

"since we know we want to work with five years, each year we drop off a year and add a new year, so this is known as the developing of a five-year rolling average, and that death benefit is adjusted once a year based on this new five-year average that is developed, and that had been our interpretation and that is the way, in fact, we administer our plan....."

There has been no question as to the competence and qualification of Mr. Fishman; no question but that he and his firm administered the Plan since its inception; and there equally should be no question but that the amount tendered represents the deceased participant's actuarilly adjusted portion of the Auxiliary Investment Fund.

POINT III

PLAINTIFF HAS NO AUTHORITY IN SUPPORT
OF HER ARGUMENT THAT THE BASE SHOULD
BE THE DECEASED'S INCOME EARNED DURING 1974

It is clear that the death benefit is based on the participant's monthly retirement under Article IV of the Plan. All of the benefits under the Plan are keyed into the retirement benefit. Article 13.04(b) (74a) specifically states that a participant's portion of the Auxiliary Fund is determined based upon the amount needed to provide the retirement benefit on the Normal Retirement Date. Thus in calculating the death benefit based upon the participant's average salary for the five years preceding death, the trustee is merely following the mandate of the pension plan.

To pay the higher benefit as the Plaintiff demands could cause possible Internal Revenue Service disqualification of the plan, since it could be held that the overpayment was an attempt to discriminate in favor of highly paid employees.

Mr. Waldman's letter (75a) states that, in fact, the trustee calculated the benefit for the deceased based upon a \$60,000.00 salary. This is what any prudent trustee would do, since it would assume that the deceased would earn a salary of \$60,000.00 a year for at least five years and would not die in that period. Therefore to have sufficient funds on hand to provide benefits, it would start funding for benefits at a higher level. This has nothing to do with benefits, it is only a method of anticipating costs.

Mr. Fishman stated (35a-line 23) that

"we averaged the prior five full years and we found that the number came out less, so we used the final five years which was a higher average so it meant a higher death benefit."

Appellee respectfully submits that the actuary and the trustee made every effort, within the guidelines of the Plan, to pay out to the plaintiff all that was legally permissible.

CONCLUSION

For the reasons stated above, it is respectfully urged that the judgment entered herein should, in all respects be affirmed, together with costs and attorney's fees to Defendant-Appellee.

Respectfully submitted

WALTER HOFER
Attorney for Defendant-Appellant

Of Counsel:
Milton I. Rothman

COURT OF APPEALS
SECOND CIRCUIT

ANASTASIA KANDELL,
Plaintiff-Appellant,

- against -

RAYDELL PUBLISHING & DISTRIBUTING
CORPORATION EMPLOYEES PENSION PLAN
Defendant-Appellee

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

ss.:

I, Victor Ortega, being duly sworn, depose and say that deponent is not a party to the action,
is over 18 years of age and resides at 1715 Lacombe Avenue; Bronx, New York

That on the 14th day of April, 19 77 at 250 West 57th St.
New York, N. Y.

deponent served the annexed

upon
Englander & Englander

Brief

the in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the herein,

Sworn to before me, this 14th
day of April, 19 77

Robert T. Brin

Victor Ortega
Victor Ortega

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977